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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1190.

J. G. McCALL, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

FILED AUGUST 8, 1889.

accession 28954

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of superior court of the State of California in and for the city and and county of San Francisco, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said superior court, before you or one of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between J. G. McCall, plaintiff in error, and The People of the State of California, defendant in error, wherein was drawn in question the validity of an authority exercised under said State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, a manifest error hath happened, to the great damage of the said J. G. McCall, plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, D. C., together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be-inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of April, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

Seal U. S. Circuit Court, Northern Dist. Cal.

L. S. B. SAWYER,
Clerk U. S. Circuit Court, Northern District of California.

The above writ of error is hereby allowed.

WALTER H. LEVY,
Presiding Judge of the Superior Court of the State of California in and for the City and County of San Francisco.

2 [Endorsed:] 5361. United States. J. G. McCall, plaintiff in error, *vs.* The People of the State of California, defendant in error. Writ of error. A copy of the within writ of error was this 15th day of April, A. D. 1889, lodged in the office of the clerk of the superior court of the State of California in and for the city and county of San Francisco. S. Heydenfeldt, Jr., att'y for plaintiff

in error. Filed April 15, 1889. Wm. A. Davies, clerk, by J. B. Mulcahy, deputy clerk.

3 UNITED STATES OF AMERICA, *ss:*

To the People of the State of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1889, pursuant to a writ of error lodged and filed in the office of the clerk of the superior court of the State of California in and for the city and county of San Francisco, wherein J. G. McCall is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Seal Superior Court, City & County of San Francisco, Cal.

Witness the honorable presiding judge of the superior court of the State of California in and for the city and county of San Francisco this 10th day of May, A. D. 1889, and of the Independence of the United States the one hundred and thirteenth.

F. W. LAWLER,
Presiding Judge of the Superior Court of the State of California in and for the City and County of San Francisco.

4 [Endorsed:] In the Supreme Court of the United States. J. G. McCall, plaintiff in error, *vs.* The People of the State of California, defendant in error. Original citation. Due service of the within citation is hereby admitted, by copy, this 15th day of May, A. D. 1889. R. W. Waterman, Governor of the State of Cal. G. A. Johnson, att'y general. Filed May 15, 1889. Wm. A. Davies, clerk, by J. B. Mulcahy, deputy clerk.

5 Know all men by these presents that we, Martin Kelly and Joseph P. Kelly, are firmly held and bound unto The People of the State of California in the full and just sum of three hundred ($300) dollars, to be paid to the said People of the State of California; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of May, A. D. 1889.

Whereas lately, in a suit depending in the superior court of the city and county of San Francisco, State of California, between The People of the State of California against J. G. McCall, judgment was rendered against said J. G. McCall, and the said J. G. McCall having obtained a writ of error and filed and lodged a copy

6 thereof in the clerk's office of said superior court to reverse the judgment in the aforesaid suit, and a citation having issued, directed to The People of the State of California, citing and admonishing the said People of the State of California to be and

appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next:

Now, the condition of the above obligation is such that if the said J. G. McCall shall prosecute his writ of error to effect and answer all damages and cost, then the above obligation to be void; else to remain in full force and virtue.

MARTIN KELLY. [SEAL.]
JOSEPH P. KELLY. [SEAL.]

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

7 Joseph P. Kelly and Martin Kelly, sureties above named, each being duly sworn, deposes and says for himself personally that he is a freeholder and resident within the State of California, and that he is worth the sum of three hundred dollars over and above his debts and liabilities, exclusive of property exempt from execution.

MARTIN KELLY. [S-L.]
JOSEPH P. KELLY. [S-L.]

Subscribed and sworn to before me this 10th day of May, A. D. 1889.

GEO. H. PIPPY,
Deputy County Clerk.

The above bond, both as to form, sufficiency of sureties, and amount, is hereby approved this 10th day of May, A. D. 1889, and of the Independence of the U. S. the 113th.

F. W. LAWLER,
Presiding Judge of the Superior Court of the City and County of San Francisco, State of California.

(Endorsed:) Filed May 10, 1889. Wm. A. Davis, clerk, by J. B. Mulcahy, deputy clerk.

8 In the Police Judge's Court of the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

THE PEOPLE OF THE STATE OF CALIFORNIA }
vs. }
J. G. McCALL. }

Personally appears before me this 28th day of March, A. D. 1888, Thomas Wilson, who, on oath, makes complaint and deposes and says that on the 27th day of March, A. D. 1888, in the city and county of San Francisco, State of California, the crime of misdemeanor was committed, to wit, by J. G. McCall (whose real name is unknown to this complainant), who then and there was willfully and unlawfully engaged in and did then and there willfully and unlawfully engage

in, transact, and carry on the business, trade, profession, and calling of railroad agent without having first taken out and procured the municipal license required by ordinance of the board of supervisors of the said city and county of San Francisco, thereby violating the provisions of section 1 and subdivision 33 of section 10, order No. 1589, of the board of supervisors of said city and county of San Francisco; all of which is contrary to the form, force, and effect of the statute in such case made and provided and against the peace and dignity of the people of the State of California; and this complainant, upon oath, accuses the said J. G. McCall of having committed the said crime; and this complainant further alleges and deposes that the said accused was then and there arrested therefor in the actual commission of the said offense, and prays that the said accused may be brought before a magistrate and dealt with according to law.

THOMAS WILSON,
Dep. Lic. Coll.

Res. or place of bus. —.
(Brown, D. C.)

Subscribed and sworn to before me this 28th day of March, A. D. 1888.

F. A. HORNBLOWER,
Judge of the Police Judge's Court of the City and County of San Francisco.

9 [Endorsed:] License order. The People of the State of California *vs.* J. G. McCall. Complaint. Complainant, Thos. Wilson. Filed in the police judge's court of the city and county of San Francisco this 28th day of March, 1888. Jno. J. Kenny, clerk.

10 *Minute Docket.*

In the Police Judge's Court of the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*
Court-Room of said Court,

THURSDAY, *March 29th*, 1888.

In open court.

Present presiding: Hon. Frederick A. Hornblower, judge of the police judge's court.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
J. G. MCCALL. } Charged with Misdemeanor.

By consent the court ordered this action to be continued until Thursday, April 5th, 1888.

11 *Minute Docket.*

In the Police Judge's Court of the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:
Court-Room of said Court,

THURSDAY, *April 5th*, 1888.

In open court.

Present presiding: Hon. Frederick A. Hornblower, judge of the police judge's court.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
J. G. McCALL. } Charged with Misdemeanor.

By consent the court orders this action to be continued until Tuesday, April 10th, 1888.

12 *Minute Docket.*

In the Police Judge's Court of the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:
Court-Room of said Court,

TUESDAY, *April 10th*, 1888.

In open court.

Present presiding: Hon. Frederick A. Hornblower, judge of the police judge's court.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
J. G. McCALL. } Charged with Misdemeanor.

In this action the defendant personally present pleads not guilty; the defendant and the people expressly waive trial by jury.

The defendant consents to be tried by the court.

The court after hearing the testimony of J. G. McCall takes the matter under advisement until Monday, April 30th, 1888.

13 *Minute Docket.*

In the Police Judge's Court of the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*
Court-Room of said Court,

MONDAY, *April 30th*, 1888.

In open court.

Present presiding: Hon. Frederick A. Hornblower, judge of the police judge's court.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
J. G. MCCALL. } Charged with Misdemeanor.

By consent the court orders this action to be continued until Monday, May 7th, 1888.

14 *Minute Docket.*

In the Police Judge's Court of the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*
Court-Room of said Court,

MONDAY, *May 7th*, 1888.

In open court.

Present presiding: Hon. Frederick A. Hornblower, judge of the police judge's court.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
J. G. MCCALL. } Charged with Misdemeanor.

By consent the court orders this action to be continued until Saturday, June 23rd, 1888.

15 *Minute Docket.*

In the Police Judge's Court of the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*
Court-Room of said Court,

SATURDAY, *June 3rd*, 1888.

In open court.

Present presiding: Hon. Frederick A. Hornblower, judge of the police judge's court.

THE PEOPLE OF THE STATE OF CALIFORNIA } Charged with Misdemeanor.
vs.
J. G. McCALL.

In this action, the defendant personally present and having heretofore pleaded not guilty, and this action having been partially heard, the trial was resumed.

The court, after having the matter under advisement, finds the defendant guilty as charged, and orders that he appear for sentence at 10 o'clock a. m. on Monday, July 23rd, 1888.

16 *Minute Docket.*

In the Police Judge's Court of the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*
Court-Room of said Court,

MONDAY, *July 23rd*, 1888.

In open court.

Present presiding: Hon. Frederick A. Hornblower, judge of the police judge's court.

THE PEOPLE OF THE STATE OF CALIFORNIA } Convicted of Misdemeanor.
vs.
J. G. McCALL.

By consent, the court orders this action to be continued until Monday, August 6th, 1888.

17 *Minute Docket.*

In the Police Judge's Court of the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*
Court-Room of said Court,

MONDAY, *August 6th*, 1888.

In open court.

Present presiding: Hon. Frederick A. Hornblower, judge of the police judge's court.

THE PEOPLE OF THE STATE OF CALIFORNIA } Convicted of Misdemeanor.
vs.
J. G. McCALL.

By consent, the court orders this action to be continued until Thursday, September 20th, 1888.

18 *Minute Docket.*

In the Police Judge's Court of the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:
Court-Room of said Court,

THURSDAY, *September* 20*th*, 1888.

In open court.

Present presiding: Hon. Frederick A. Hornblower, judge of the police judge's court.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
J. G. MCCALL. } Convicted of Misdemeanor.

By consent, the court orders this action to be continued until Tuesday, October 2nd, 1888.

By consent, the court orders this action to be continued until Friday, October 26th, 1888.

By consent, the court orders this action to be continued until Friday, November 9th, 1888.

By consent, the court orders this action to be continued until Friday, November 16th, 1888.

19 *Minute Docket.*

In the Police Judge's Court of the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:
Court-Room of said Court,

FRIDAY, *November* 16*th*, 1888.

In open court.

Present presiding: Hon. Frederick A. Hornblower, judge of the police judge's court.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
J. G. MCCALL. } Convicted of Misdemeanor.

In this action the defendant personally appears for sentence.

Motion for new trial denied.

Motion in arrest of judgment denied.

The court renders its judgment:

That whereas the said defendant having been duly convicted in this court of the crime of misdemeanor—

It is therefore ordered and adjudged, as a punishment therefor, that the said defendant pay a fine of twenty (20) dollars, and in default of payment of said fine that said defendant be imprisoned in the county jail of the city and county of San Francisco, State of California, until said fine is paid, not exceeding twenty (20) days, the same being at the rate of one day for each dollar of said fine remaining unpaid.

[Clerk's certificate.]

20 In the Police Judge's Court of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
J. G. McCALL.

To the Hon. Joseph F. Coffey, attorney for the People of the State of California:

You will please take notice that on Monday, the 26th day of November, A. D. 1888, at the hour of 10 a. m. of said day, defendant will present to the judge of said court his bill of exceptions and statement on appeal for settlement and allowance.

Yours, &c., JOSEPH P. KELLY,
Attorney for Defendant.

(Endorsed:) Due service of the within notice admitted, by copy, this 19th day of November, A. D. 1888. Joseph F. Coffey, prosecuting attorney and attorney for the people.

21 In the Police Judge's Court, City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
J. G. McCALL.
} Notice of Appeal.

To the Hon. Joseph F. Coffey, prosecuting attorney, and clerk of said court:

You will please take notice that the defendant in said action appeals to the superior court of the city and county of San Francisco, State of California, from the final judgment of conviction in said action and from the order denying defendant's motion for a new trial, and also from the order denying defendant's motion in arrest of judgment made and entered on the 16th day of November, A. D. 1888.

JOSEPH P. KELLY,
Defendant's Attorney.

Dated November 16th, 1888.

Received a copy of within notice this sixteenth day of November, A. D. 1888.

JOSEPH F. COFFEY,
Prosecuting Attorney, Police Judge's Court.

(Endorsed:) Filed Nov. 16th, 1888.

22 [Endorsed:] Police judge's court, city and county of San Francisco. The People of the State of California *vs.* ——— ———. Notice of appeal. ——— ———, defendant's attorney. Filed in the police judge's court of the city and county of San Francisco this — day of —, 188–. ——— ———, clerk.

23 In the Police Judge's Court of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
J. G. MCCALL.

Bill of Exceptions and Statement on Appeal.

Be it remembered that this cause came on regularly to be heard on the 10th day of April, A. D. 1888, in the police judge's court of the city and county of San Francisco, State of California, the defendant being personally present and pleading not guilty.

The said cause was thereupon duly and regularly tried before the said court, sitting without a jury—a trial jury having been waived by the defendant and also by the people.

Joseph F. Coffey, Esq., appearing for the People of the State of California and Joseph P. Kelly, Esq., for the defendant.

24 It was thereupon agreed by the people and the defendant that the defendant was a railroad agent in this city and county and had not taken out a license for the quarter ending March 31, 1888, whereupon the people closed their case.

The defendant then took the stand as a witness in his own behalf and testified as follows:

"I am a railroad agent. I represent the New York and Lake Erie railroad, which is a corporation having its place of business in Chicago, Illinois, and which controls, manages, and operates a continuous line of railway between Chicago and New York; that my duty as such railroad agent is to solicit passenger traffic in this city and county over said road; that I sell no tickets to such passengers either over the line I represent or any other, but take them to the Central Pacific R. R. Co. and they sell the tickets; that the

25 only duty I am required to perform for such company is to induce people contemplating taking a trip East to be booked over the line I represent; that I neither received nor paid out any money or other valuable consideration on account thereof; that my authority as such railroad agent was and is limited as above stated.

The cause was thereupon submitted to the court for its decision; that on the 23rd day of June, A. D. 1888, the court rendered its decision and found the defendant guilty.

The defendant was ordered to appear for sentence on the 16th day of November, A. D. 1888, at which time the defendant was present in court with his attorney, and before judgment was pronounced he moved the court — an arrest of judgment upon the following grounds:

1. That the facts stated in the complaint do not constitute a public offense.

2. That the complaint contains matter which is a legal bar to the prosecution.

26 Which said motion was taken by the court under advisement, and afterward, to wit, on the 16th day of November, A. D. 1888, the said court denied said motion, the defendant excepting thereto.

Whereupon the court proceeded to pronounce judgment and ordered the defendant to pay a fine of twenty dollars.

That the court erred in finding the defendant guilty; that the court erred in pronouncing judgment upon him and finding him twenty dollars; that the court erred in denying defendant's motion in arrest of judgment.

I hereby certify the foregoing to be correct and true, and hereby settle and allow the same as the bill of exceptions and statement on appeal in the above-entitled cause.

F. A. HORNBLOWER,
Judge of the Police Judges' Court.

Approved:
JOS. F. COFFEY,
Att'y for People.

(Endorsed:) Filed Feb'y 2nd, 1879.

27 (Endorsed:) In the police court of the city and county of San Francisco, State of California. The People of the State of California *vs.* J. G. McCall. Charge of misdemeanor. Filed in the superior court of the city and county of San Francisco this 19th day of Jan'y, 1889. Wm. A. Davies, clerk, by J. B. Mulcahy, deputy clerk.

28 *Appeal from Police Judges' Court.*

In the Superior Court, City and County of San Francisco, State of California.

JANUARY 26TH, A. D. 1889.

THE PEOPLE OF THE STATE OF CALIFORNIA *vs.* J. G. MCCALL. } Convicted of Misdemeanor.

It is ordered that the above-entitled cause, appealed from the police judges' court of the city and county of San Francisco and

filed in the superior court of the city and county of San Francisco, State of California, on the 19th day of January, A. D. 1889, be, and the same is hereby, assigned to Hon. D. J. Murphy, judge, department No. 12 of this court, for trial and determination.

WALTER H. LEVY,
Presiding Judge of the Superior Court.

(Endorsed:) Filed Jan'y 30th, 1889. Wm. A. Davies, clerk, by J. B. Mulcahy, deputy clerk.

29 [Endorsed:] No. 5361. Superior court, city and county of San Francisco, State of California. Department No. 12. Appeal from police judges' court. The People of the State of California *vs.* J. G. McCall. Order assigning cause.

30 In the Superior Court, City and County of San Francisco, State of California. Department No. 12.

FRIDAY, *April the 5th, A. D.* 1889.

Present: Hon. D. J. Murphy, judge.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
J. G. MCCALL. } Misdemeanor Appeal.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement and all and singular the law and premises having been fully considered by the court, it is ordered, adjudged, and decreed by the court that the judgment and order heretofore rendered in the police judge's court in and for the city and county of San Francisco in the above-entitled cause be, and the same is hereby, affirmed and the remittitur ordered held until April 15th, 1889, and the opinion of the court was filed.

31 In the Superior Court of the City and County of San Francisco, State of California. Department No. 12.

Hon. D. J. Murphy, judge.

THE PEOPLE, etc.,
vs.
J. G. MCCALL. } On Appeal from Police Judge's Court.

Opinion of Court.

The defendant (appellant herein) was convicted in the police judge's court of misdemeanor under subdivision XXXIII, section X, of order No. 1589 of the board of supervisors of this city and county "imposing municipal licenses," which provides as follows:

"SECTION 1. Every person who shall violate any of the provisions of this order shall be de-med guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not more than one thousand dollars or by imprisonment no more than six months or by both.

"SECTION 10. The rates of license shall be according to the following schedule.

"Subdivision XXXIII is as follows:

32 "First. For every railroad agency, twenty-five dollars per quarter."

The facts upon which such conviction was had, as appears from the statement on appeal, were as follows:

The defendant was and is a railroad agent in this city and county and had not taken out a license for the quarter ending March 31st, 1888; that he represented, as such agent, the New York and Lake Erie R. R., which is a corporation having its place of business in Chicago, Ill., and which controls and manages a continuous line of railroad between Chicago and New York; that defendant's duty, as such agent, is to solicit passenger traffic in this city and county over said road; that he does not sell tickets to such passengers over the line he represents or any other, but takes such passengers to the Central Pacific R. R. Co. and solicits them to purchase through tickets over the road he represents and induces passengers contemplating Eastern trips to be booked over the said New York and Erie road; that he neither receives nor pays out any money for said railroad company, and that his only authority is as above stated.

Upon the above-stated facts the defendant, after convic-

33 tion, appeals from the judgment against him, and the only question raised is the legality of said order. There is no contention on the part of appellant that said order of the board of supervisors in anywise conflicts with the laws of the State, nor that it is an unwarrantable exercise of police power or an improper means of raising revenue by requiring a license for the transaction of business, other than it is contended in a very able argument filed on behalf of the appellant that the order here involved is illegal and void because the municipality cannot compel or require the defendant under the above facts to take out a license, for the reason that it is imposing a tax in the nature of a license fee upon inter-state commerce, and hence in conflict with the Constitution of the United States and the laws of Congress.

If this contention is well based, of course the conviction cannot be maintained. The only questions, therefore, to be determined are whether or not the appellant was engaged in inter-state commerce and whether said order is by the imposition of this license an attempt to regulate or an interference with or laying an unauthorized burden upon interstate commerce.

The question involved is one of interest, and has been the source of prolific discussion in not only the Federal courts, but in

34 the courts of every State in the Union, and much law on the subject is to be found in the reports. There is but little question about the law of the case, the only difficulty being in its application to the facts.

The case of the Norfolk & Western R. R. Co. *vs.* Commonwealth of Pennsylvania, 5 Central Reporter, 240, also reported in 26 American and English Railroad Cases, p. 48, presents almost an identical state of facts with the case in hand, and, inasmuch as I feel compelled

to follow that case, I deem it proper to give the facts upon which the decision was based and to give copious extracts from the opinions not only of the common pleas court, but also from the supreme court in that case, the facts of which are as follows:

The railroad is a corporation existing under the laws of the States of Virginia and West Virginia, and its main line and branches are within these States. Its line of road connects at several points with other railroads, and by virtue of these connections and traffic contracts and agreements it has become a link in a through line of road over which, as part of the business thereof, freight and passengers are carried into Pennsylvania.

35 It had an office in Pennsylvania for the use of its officers, agents, employees, etc. Its main office is in Roanoke, Va. It has no corporate capital invested in Pennsylvania other than purchasing materials and supplies for the use of the road.

It has refused to pay license fee, as required by acts of the Legislature of Pennsylvania. * * *

It was claimed in that case as in this, that the defendant being engaged in interstate commerce, the act requiring the railroad to pay a license fee for maintaining an office in Pennsylvania was in conflict with art. I, sec. 8, of the Constitution of the United States and the laws of Congress.

In the common pleas court it was held, * * * "The defendant is a foreign corporation carrying freight and passengers upon a line of railroad lying wholly without this Commonwealth. In strictness it has no existence herein, and it certainly does not of itself carry any person or thing hereinto or hereout. At the end of its road it receives or delivers to or from connecting roads certain freight and passengers, which by such roads are carried into or which have been carried out of this State, and it has traffic contracts with those roads which effect such reception and delivery; but

36 since it does not itself transport between Pennsylvania and other points we are of opinion that it cannot claim the protection of the commercial clause against the license fee in suit. * * *

"Thus the question whether a corporation was engaged in interstate commerce would often depend not upon the business it was lawfully doing, but upon its contracts with other corporations, and even upon the good faith with which they are kept. If by contract a through line was established and continued to be maintained interstate commerce would exist as to all contracting parties. If there was no such contract, or if it should be broken, there would be no such commerce, save as to the party directly carrying between the States, while in both instances the nature of the business done by each would be the same.

"We think the existence of connections or of traffic contracts cannot be decisive.

"If a through line is made up by several distinct corporate agencies each must be judged by the actual corporate business which it actually does, and where, as in this case, it only carried persons or goods over a space which is wholly within one State, such carriage

is the proper test of its commercial character in an inquiry
37 like this. No doubt in one sense it is engaged in interstate commerce, for it helps to carry from one point in one State to a point in another State, but the meaning of the commercial clause cannot be thus wide.

"In the same sense it might be said with equal force that a merchant in New York who sells and ships goods to the West is also engaged in interstate commerce, because he helps to carry by hauling his goods from his store to the railway station. Surely if no other clause of the Federal Constitution gave him the right to have an office in Pennsylvania the commercial clause alone would not support his claim to enjoy that privilege in the face of hostile legislation by the State. * * *

"We have been referred to no authority which takes the defendant's view, and we do not think the principle which underlies the commercial clause extends so far." * * *

The supreme court of Pennsylvania, on appeal from the judgment of the common pleas court, say, * * * "The transportation which this railroad company may lawfully conduct by virtue of its own corporate franchise is not interstate transportation at all, but is confined to territorial limits which are entirely without the State of Pennsylvania; in other words, this company has no corporate franchise to carry any freight or passengers from or to any
38 point in Pennsylvania; hence as to Pennsylvania its transportation as authorized by its charter cannot be regarded as interstate transportation in any point of view." * * *

"And in the sense that the carriage of freight and passengers over such through routes from one State to another is interstate commerce, the proportion which this company contributes to such carriage may be regarded as a portion of such commerce; but this is not the sense in which, as we understand it, the commercial clause of the Federal Constitution is to be interpreted when its immunity is to be invoked by a particular corporation or person engaged in the transportation business. We understand that its protection is extended only to such transportation as is completely and lawfully authorised to be conducted from one State to another.

"We have carefully examined all the authorities cited for the plaintiff in error and do not find that they expressly or inferentially decide that a local corporation which contributes only its own local right of traffic to a system of through traffic by means of contract arrangements with the local companies can for that reason
39 be permitted to exercise its corporate franchise within a foreign jurisdiction free of such burdens as may be imposed by such foreign jurisdiction upon the theory that it is engaged in interstate commerce."

I think the reasoning in the above case is fully sustained and warranted by the case of Pembina Consol S. M. & M. Co. *vs.* Pennsylvania, decided March 19, 1888, by the Supreme Court of the United States and reported 8 Supreme Court Reporter, p. 737.

The case of Smith *vs.* Alabama, 124 U. S. Reports, p. 465, may also be read with interest as bearing on the question here involved.

In that case the late Mr. Justice Matthews says: * * * "It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations. They are constructed within the territorial limits of a State and by the authority of its laws and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located and the plans according to which they must be constructed are prescribed by the legislation of the State. * * * The rules prescribed for their construction and for their management
40 and operation * * * are strictly within the limits of the local law. They are not *per se* regulations of commerce. It is only when they operate as such in the circumstances of their application and conflict with the express or presumed will of Congress exerted on the same subject that they can be required to give way to the supreme authority of the Constitution." * * *

I have examined all the cases cited by the learned counsel for the appellants, and in each and every one of them the court found or the facts clearly established that the corporation sought to be affected was engaged in interstate commerce between foreign States and that in which the local remedy was sought to be enforced, and in no case to which my attention has been called by appellant are the facts, in my judgment, at all similar to those of the Norfolk and Western R. R. Co. case or the case at bar; hence I am led to the conclusion that while these authorities are undoubtedly correct on the facts as disclosed in each of these cases, yet upon the facts in this case they should not control.

41 The reasoning of the supreme court of Pennsylvania in the Norfolk & Western R. R. Co. case, above mentioned, meets my approval, and, in accordance therewith, I hold in this case that since the New York and Erie R. R. Co. does not itself transport freight or passengers between California and other points that it cannot claim the protection of the commercial clause of the Constitution of the United States against the license order of our board of supervisors; that, so far as we in this State are concerned, the said railroad has no corporate franchise to carry any freight or passengers from or to any point in California, and that therefore its transportation, as authorized by its charter, cannot be regarded as interstate transportation with us; hence, that the board of supervisors had a legal right to impose upon the defendant, under the facts herein stated, the license fee, and that the same is legal and valid.

Judgment affirmed.

D. J. MURPHY, *Judge.*

San Francisco, April 4th, 1889.

(Endorsed:) Filed April 5th, 1889. Wm. A. Davies, clerk, by F. M. Page, deputy clerk.

42 In the Superior Court of the City of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
J. G. McCALL, Defendant.
} Stipulation.

It is hereby stipulated and agreed that the defendant in the above-entitled action was arrested and convicted of misdemeanor un er subdivision XXXIII, section X, of order No. 1589 of the board of supervisors of said city and county of San Francisco, "imposing municipal licenses," which provides as follows:

"SECTION 1. Every person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not more than one thousand dollars or by imprisonment no more than six months, or by both.

"SECTION 10. The rates of licenses shall be according to the following schedule:

43 " * * * Subdivision XXXIII.—First. For every railroad agency, twenty-five dollars per quarter."

(2.) That the defendant in said action set up and pleaded as a defense in his behalf that the order above mentioned was and is repugnant to the Constitution of the United States.

(3.) That the said superior court decided that the said order was valid and that it was not repugnant to the Constitution or laws of the United States.

It is further stipulated and agreed that this stipulation be filed, and the same is hereby made a part of the record in said case, to be used on the hearing of the writ of error in the United States Supreme Court at Washington, D. C.

JOSEPH P. KELLY,
Attorney for Defendant.
JAS. D. PAGE,
District Attorney of the City and County of San Francisco, State of California, Attorney for Plaintiff.

Dated San Francisco, April 14, 1889.

(Endorsed:) Filed May 2nd, 1889. Wm. A. Davies, clerk, by J. B. Mulcahy, deputy clerk.

44 In the Superior Court, City and County of San Francisco, State of California. Department No. 12.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
J. G. McCALL, Defendant.
} No. 5361.

I, Wm. A. Davies, county clerk of the city and county of San Francisco and *ex officio* clerk of the superior court for the city and

county of San Francisco, State of California, do hereby certify the foregoing to be full, true, and correct copies of the original papers on appeal from the police judge's court of the city and county of San Francisco and the various papers filed in the superior court of the city and county of San Francisco, on file and of record in my office in the above-entitled cause; that the same constitute a full and complete exemplification of the record in the said cause and of the whole thereof.

All of which I have caused to be exemplified according to the act of Congress.

Seal of Superior Court, City & County of San Francisco, Cal.

In witness whereof I have hereunto set my hand and affixed the seal of said court this twelfth day of July, A. D. 1889.

WM. A. DAVIES,
County Clerk and ex Officio Clerk of the Superior Court.

I, Walter H. Levy, presiding judge of the superior court of the city and county of San Francisco, State of California, do hereby certify that said court is a court of record having a clerk and seal; that Wm. A. Davies, who has signed the annexed attestation, is the duly elected and qualified county clerk of the city and county of San Francisco, and was at the time of signing said attestation *ex officio* clerk of said superior court; that said signature is his genuine handwriting, and that all his official acts as such clerk are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this 12th day of July, A. D. 1889.

WALTER H. LEVY,
Presiding Judge of the said Superior Court.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

I, Wm. A. Davies, county clerk of the city and county of San Francisco and *ex officio* clerk of the superior court of the city and county of San Francisco, State of California, do hereby certify that the Honorable Walter H. Levy, whose name is subscribed to the preceding certificate, is presiding judge of the superior court of the city and county of San Francisco, State of California, duly elected and qualified, and that the signature of said judge to said certificate is genuine.

Seal of Superior Court, City & County of San Francisco, Cal.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this twelfth day of July, A. D. 1889.

WM. A. DAVIES,
County Clerk and Clerk of Court.

45 [Endorsed:] No. 5361. In the superior court, city and county of San Francisco, State of California. Department No. 12. The People of the State of California *vs.* J. G. McCall, defendant. Exemplification of record.

46 UNITED STATES OF AMERICA:

Supreme Court of the United States. October Term, 1889.

J. G. McCALL, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error. } Assignment of Errors.

On the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the city of Washington, comes the said J. G. McCall, by his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. For that the superior court of the State of California in and for the city and county of San Francisco erred in adjudging that subdivision XXXIII, section X, of order No. 1589 of the board of supervisors of the city and county of San Francisco, under which the said plaintiff in error is prosecuted, is not, under the facts as they appear of record herein, repugnant to any of the provisions of the Constitution of the United States, whereas said court should have adjudged that said subdivision of said section of said
47 order was and is, under the facts as they appear of record herein, repugnant to the provisions of said Constitution, and should, upon that ground, have reversed the judgment of said police judge's court, and should have found and adjudged said plaintiff in error not guilty of the offense whereof he stood charged.

Second. For that the said superior court of the State of California in and for the city and county of San Francisco erred in affirming the judgment of the police judge's court of the said city and county finding and adjudging the said plaintiff in error guilty of the offence whereof he there stood charged under subdivision XXXIII of section X of order No. 1589 of the board of supervisors of the city and county of San Francisco, whereas said superior court should have reversed the said judgment and adjudged said plaintiff in error not guilty, because the provisions of said subdivision of said section of said order, as applied to the facts as they appear of record herein, were and are repugnant to the provisions of the Constitution of the United States.

Third. For that said superior court of the State of California in and for the city and county of San Francisco erred in affirming the judgment of said police judge's court of the city and county of San Francisco denying the motion of the said plaintiff in error in arrest of judgment in said cause, whereas the said superior court should have reversed said judgment denying said motion and
48 should have granted said motion in arrest of judgment and should have arrested said judgment, because the provisions of subdivision XXXIII of section X, of order No. 1589, of the board of supervisors of the city and county of San Francisco, under which said plaintiff in error was prosecuted, as applied to the facts as they

appear of record herein, were and are repugnant to the provisions of the Constitution of the United States.

And the said J. G. McCall prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he has lost by reason of said judgment.

J. G. McCALL,
Plaintiff in Error,
By S. HEYDENFELDT, JR.,
His Attorney.

Endorsed on cover: California, San Francisco, superior court. No. 1190. J. G. McCall, plaintiff in error, *vs.* The People of the State of California. Filed August 8, 1889.

FILED.
OCT 14 1889
JAMES H. McKENNEY,
CLERK.

No. 1190.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1889.

J. G. McCALL,

Plaintiff in Error.

VS.

The People of the State of California,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

JOSEPH P. KELLY,
Attorney for Plaintiff in Error.

Filed October ..... *1889.*

..... *Clerk.*

By ..... *Deputy Clerk.*

In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1889.

J. G. McCALL,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

No. 1,190.

BRIEF OF PLAINTIFF IN ERROR.

This case is brought up by writ of error to the Superior Court of the State of California, in and for the City and County of San Francisco. The plaintiff in error was convicted in the Police Judge's Court of the City and County of San Francisco, of misdemeanor under sub-division XXXIII of Section 10 of Order No. 1589 of the

Board of Supervisors of said city and county, "Imposing Municipal Licenses," which provides as follows: "Section 1. Every person who shall "violate any of the provisions of this Order shall "be deemed guilty of a misdemeanor, and upon "conviction thereof, shall be punished by a fine "of not less than one thousand dollars, or by "imprisonment not more than six months, or by "both. * * * Section 10. The rates of "license shall be according to the following "schedule. * * * Sub-division XXXIII. "First—For every railroad agency, twenty-five "dollars per quarter."

The facts upon which such conviction was had, as appears from the record on file herein, and concerning which there is no dispute or controversy of any kind, were as follows:

The plaintiff in error was and is a railroad agent in the City and County of San Francisco, State of California, and had not taken out a license for the quarter ending March 31, 1888, as required by the terms of said order. That he represented the New York, Lake Erie and Western Railroad Company, which is a corporation, having its principal place of business in Chicago, Ill., and which controls, manages and operates a continuous line of railroad between Chicago and New York, and is engaged in the transportation

of freight and passengers over its line of road. That the plaintiff in error's duty as such agent was and is to solicit passenger traffic in the City and County of San Francisco over said road. That he does not sell tickets to such passengers over the line he represents or any other, but takes such passengers to the Central Pacific Railroad Company and solicits them to purchase through tickets over the road he represents, and induces passengers contemplating Eastern trips to be booked over the said New York, Lake Erie and Western Railroad.

After conviction and before sentence was pronounced plaintiff in error, through his counsel, made a motion in arrest of judgment, which was denied, and the said Police Judge's Court thereupon pronounced its judgment from which judgment and order denying motion in arrest of judgment the plaintiff in error appealed to the Superior Court of the State of California, in and for the City and County of San Francisco, which latter Court affirmed the judgment of the lower Court, and it is this latter judgment we desire reviewed in this Court.

The errors which we have asserted and intend to urge upon the hearing of this case are as follows:

FIRST.—That the Superior Court of the State of California, in and for the City and County of San Francisco, erred in adjudging that Subdivision XXXIII, Section X of Order No. 1589, of the Board of Supervisors of the City and County of San Francisco, under which the said plaintiff in error is prosecuted, is not, under the facts as they appear of record herein, repugnant to any of the provisions of the Constitution of the United States, whereas said Court should have adjudged that said subdivision of said section of said order was, and is, under the facts, as they appear of record herein, repugnant to the provisions of said Constitution, and should, upon that ground, have reversed the judgment of said Police Judges' Court, and should have found and adjudged said plaintiff in error not guilty of the offense whereof he stood charged.

SECOND.—That the said Superior Court of the State of California, in and for the City and County of San Francisco, erred in affirming the judgment of the Police Judge's Court of the said city and county, finding and adjudging the said plaintiff in error guilty of the offense whereof he there stood charged, under Subdivision XXXIII. of Section X, of Order No. 1589 of the Board of Supervisors of the City and County of San Francisco, whereas said Superior Court should

have reversed the said judgment and adjudged said plaintiff in error not guilty, because the provisions of said subdivision of said section of said order, as applied to the facts as they appear of record herein, were, and are, repugnant to the provisions of the Constitution of the United States.

THIRD.—That said Superior Court of the State of California in and for the City and County of San Francisco, erred in affirming the judgment of said Police Judge's Court, of the City and County of San Francisco, denying the motion of the said plaintiff in error, in arrest of judgment in said cause, whereas the said Superior Court should have reversed said judgment denying said motion, and should have granted said motion in arrest of judgment, and should have arrested said judgment, because the provisions of Subdivision XXXIII. of Section X. of Order No. 1589 of the Board of Supervisors of the City and County of San Francisco, under which said plaintiff in error was prosecuted, as applied to the facts as they appear of record herein, were, and are, repugnant to the provisions of the Constitution of the United States.

The only point we desire to make in this Court, with respect to the case at bar, is that the City and County of San Francisco cannot com-

pel or require the plaintiff in error to take out a license for the transaction of the business he pursues for the reason that the imposition of such tax would be an attempt upon the part of the municipality to regulate interstate commerce, and violative of the commercial clause of of the United States Constitution.

This being the case, it becomes necessary for us to consider what commerce and interstate commerce is; whether the plaintiff in error is engaged in interstate commerce and whether the imposition of such tax upon his business is an attempt at regulation of such commerce.

"Commerce with foreign countries and among "the States, strictly considered, consists in in- "tercourse and traffic, including in these terms "navigation and the transportation and transit "of persons and property, as well as the pur- "chase, sale and exchange of commodities. For "the regulation of commerce as thus defined "there can be only one system of rules, appli- "cable alike to the whole country, and the "authority which can act for the whole country "can alone adopt such a system."

County of Mobile vs. *Kimball*, 102 U. S., 691.

To the same effect is:

Passenger Cases, 7 How., 283, *Et seq.*

Gibbons vs. *Ogden*, 9 Wheaton, 189.

Is the plaintiff in error engaged in interstate commerce?

This question, in our opinion, hardly needs any discusion. The facts of the case at bar, we respectfully contend, are precisely the same, in fact identical, with those of the so-called "Drummer's Cases." Take the very recent case decided by this Court — *Robbins* vs. *Taxing District of Tennessee*, 120 U. S., 489.

The facts in that case were as follows:

Sabin Robbins, the plaintiff, in February, 1884, was engaged in the city of Memphis, Tennessee, in soliciting the sale of goods for the firm of Rose, Robbins & Co., of Cincinnati, Ohio, dealers in paper and other articles—an employment usually denominated as a drummer; a statute of Tennessee, which applied to the city of Memphis, required all drummers to take out a license at ten dollars per week, etc. Robbins did not pay his tax nor take out his license and he was arrested by the Memphis authorities and convicted. The case was taken to the Supreme Court on writ of error, on the ground that the law imposing the tax was repugnant to the clause of the Constitution of the United States, which declares that Congress shall have power to regulate commerce among the several States.

This Court decided that the *solicitation* of business by the plaintiff constituted part of interstate commerce itself, consequently no tax could be imposed upon the defendant Robbins, and that therefore the Tennessee statute was void.

In delivering the opinion of the Court, Justice Bradley says: "In these cases, then, what shall "the merchant or manufacturer do who wishes "to sell his goods in other States? Must he "sit still in his factory or warehouse and wait "for the people of those States to come to him? "This would be a silly and ruinous proceeding. "*The only other way, and the one, perhaps, which* "*most extensively prevails, is to obtain orders from* "*persons residing or doing business in those* "*other States.* But how is the merchant or "manufacturer to secure such orders? If he "may be taxed by such States for doing so, "who shall limit the tax? It may amount "to prohibition. To say that such a tax is not "a burden upon interstate commerce, is to speak "at least unadvisedly and without due attention to the truth of things. * * * * "The truth is, that in numberless instances, the "most feasible, if not the only practicable way "for the merchant or manufacturer to obtain "orders in other States, *is to obtain them by* "*personal application, either by himself or by some* "*one employed by him for that purpose,*" etc.

Following the line of *Robbins* vs. *Shelby Taxing District*, is the case of *Stontenburgh* vs. *Hennick*, 129 U. S., 141, 148. Chief Justice Fuller in delivering the opinion of the Court, says :

" The conclusions announced in the case of " Robbins, were that the power granted to Con- " gress to regulate commerce is necessarily ex- " clusive whenever the subjects of it are national " or admit only of one uniform system or plan " of regulation throughout the country, and in " such case the failure of Congress to make ex- " press regulations is equivalent to indicating its " will that the subject shall be left free; that in " the matter of interstate commerce the United " States are but one country, and are and must " be subject to one system of regulations, and " not to a multitude of systems; and *that a State* " *statute requiring persons soliciting* the sale of goods " on behalf of *individuals or firms doing business* in " *another State to pay license fees for permission to do* " *so, is, in the absence of congressional action, a reg-* " *lation of commerce in violation of the Constitution.* " The business referred to is thus definitively as- " signed to that class of subjects which calls for " uniform rules and national legislation, and is " excluded from that class which can be best " regulated by rules and provisions suggested by " the varying circumstances of different locali-

" ties, and limited in their operation to such " localities respectively. *Cooley* vs. *Board of* " *Wardens*, 12 How., 299. *Gilman* vs. *Philadel-* " *phia*, 3 Wall., 713. It falls, therefore, within " the domain of the great, distinct, substantive " power to regulate commerce, the exercise of " which cannot be treated as a mere matter of " local concern, and committed to those imme- " diately interested in the affairs of a particular " locality."

Both these cases, we respectfully contend, are on all fours with the one at bar. The record in this case shows that plaintiff in error, McCall, represents a corporation engaged in interstate commerce, operating a line of railway entirely outside of California, viz: in the Eastern States. He, McCall, is engaged in San Francisco in soliciting traffic for the railroad which he represents, therefore bringing the facts clearly within the scope of the reasoning and principles set forth in the above cases.

The judgment of this Court in the State Freight Tax Case, rested upon the ground that the tax was always added to the cost of transportation, and thus was a tax in effect upon the privilege of carrying the goods through the State.

So with the case at bar. The defendant solicits, makes the negotiations which lead up to

and culminate in the making of contracts for transportation entirely outside the State of California, and any tax upon such solicitor, negotiator, shipper or transporter is added to the cost of transportation, and thus is a tax upon the transportation itself.

"The negotiation of sales of goods which are "in another State, for the purpose of introduc- "ing them into the State in which the negotia- "tion is made, is interstate commerce."

Robbin's Case *Infra*, 497.

Of what use would it be to the shipowner in carrying on interstate and foreign commerce to have the right of transporting goods and persons free from State interference, if he had not the equal right to solicit such transportation without such interference? See on this and kindred points *Phila. Steamship Co.* vs. *Pennsylvania*, 122 U. S., 338.

"*Commerce* is a word of very wide significa- "tion; it includes the fact of intercourse and of "traffic, and the subject matter of intercourse "and traffic."

"The fact of intercourse and traffic again em- "braces all the *means, instruments* and places by "and in which intercourse and traffic are car- "ried on. * * * "

Pomeroy's Const. Law (7th ed.), 244, 245, 246, 247.

That the employment of railroad agents and the establishment of railroad agencies are *means*, and in most cases the only *means* of successfully carrying on the business of transportation of passengers on transcontinental railways, is too patent and self evident to admit of any argument, and it has been universally held that the regulation of each and all of such matters is exclusively vested in Congress.

"If State taxation of persons passing from "one State to another, or a State tax upon in- "terstate transportation of passengers is un- "constitutional, *a fortiori*, if possible, is a State "tax upon the carriage of merchandise from "one State to another in conflict with the Fed- "eral Constitution. Merchandise is the subject of "commerce, *transportation is essential to commerce*, "and *every burden* laid upon it is *pro tanto* a re- "striction. Whatever, therefore, may be the "true doctrine respecting the exclusiveness of "the power vested in Congress to regulate com- "merce among the States, we regard it that no "State can impose a tax upon freight trans- "ported from State to State, *or upon the trans- "porter because of such transportation.*"

Crandall vs. *Nevada*, 6 Wall., 35.

Is the imposition of any such tax repugnant to the interstate commerce clause in the United

States Constitution? The main proposition being proven that the plaintiff in error is engaged in interstate commerce itself, it therefore follows that a license tax of the character provided for in said order and sought to be collected would, in reality, be the imposition of a burden upon interstate commerce itself, and, consequently, a nullity. The powers of the State (by virtue of its police power), as to extent and manner in which commerce between the States can be legitimately affected by State law, is very concisely stated by Justice Bradley in *Robbins* vs. *Shelby Tax District*, cited *infra*. After stating that the State can, by virtue of its police power and jurisdiction over persons and property within its limits, provide for the security of the lives, limbs, health, comfort of persons and protection of property, that it can pass inspection laws to secure the due quality and measures of products and commodities, the Justice then goes on and states that the States have power to levy taxes upon "*avocations* and *employments* pursued "therein *not directly* connected *with interstate* "*commerce*, or *with some other employment or busi-* "*ness exercised under authority of the Constitution and* "*laws of the United States*, and taxation or regu- "lation of the latter character would be an un- "authorized interference with the power given "to Congress over the subject."

This enumeration of the States' powers seems to be very concise and conclusive.

No one for a moment can doubt that even if the defendant at bar was not engaged in interstate commerce itself, still as he is the agent of a foreign railroad corporation engaged in interstate commerce, for the purpose of solicitation of traffic for the same, it must at all events be conceded that such an avocation and employment is most directly and intimately connected with interstate commerce, and hence comes within the exception above noted.

That this tax upon the business and calling pursued and followed by plaintiff in error is void, we think admits of no doubt.

Suppose that the municipal ordinance should have provided for the payment of a license tax of such a sum that it amounted to a prohibition of this defendant carrying on the duties of his employment.

Does any one for a moment suppose that such a tax would stand? We think not. This hypothetical case is put to clearly show that in the event of a prohibitive tax the traffic of this Eastern railroad would be directly affected, and consequently an interference with interstate commerce. If California could do it every State in the Union

could do likewise. If the Board of Supervisors have power to impose $25 per quarter (as Justice Bradley in the Robbins case says), "who shall "limit the tax? It may amount to prohibition. "To say that such a tax is not a burden upon "interstate commerce is, to speak at the least, "unadvisedly and without due attention to the "truth of things."

Then again, we call especial attention to the case of *Leloup* vs. *Port of Mobile*, 127 U. S., 640. This case, we respectfully contend, is directly in point, as an examination of the facts will disclose.

It was an action brought in the Mobile Circuit Court, in the State of Alabama, by the Port of Mobile, a municipal corporation, against Edward Leloup, agent of the Western Union Telegraph Company, to recover a penalty imposed upon him for the violation of an ordinance of said Corporation, adopted in pursuance of the powers given to it by the Legislature of Alabama, and in force in August, 1883.

The ordinance was as follows, to-wit:

"Be it ordained by the Mobile Police Board, "that the license for the year from the 15th of "March, 1883, to the 15th of March, 1884, be, "and the same is hereby, fixed as follows: "* * * * * On telegraph companies $225.

" Be it further ordained, for each and every vio-
" lation of the aforesaid ordinance, the person
" convicted thereof shall be fined by the Re-
" corder, not less than one, nor more than fifty
" dollars."

The complaint alleged that the defendant was a managing agent of the Western Union Telegraph Company, engaged in business in the said Port of Mobile, and there engaged in the business and occupation of sending and transmitting telegrams from and to points within and without the State of Alabama; that he committed a breach of said ordinance by neglecting and refusing to pay said license.

The defendant pleaded that he was such agent, and among other things, that the telegraph company was engaged in interstate commerce, and that he, as such agent, and in no other manner or capacity was engaged in the telegraph business, and that said ordinance attempted to regulate interstate commerce.

To this plea a demurrer was interposed and sustained, and judgment was given for the plaintiff; and on appeal to the Supreme Court of Alabama, the judgment was affirmed; afterwards on writ of error it was brought before the Supreme Court of the United States for review, and this Court,

after a very careful examination of the law and facts, reversed the judgment of the lower Court.

Justice Bradley in delivering the opinion of the Court, at page 644, says:

"Is the ordinance a violation of the Constitu-
"tion of the United States? We will not gain-
"say that this license tax was imposed as a
"revenue measure, as a means of taxing the busi-
"ness, and thus compelling it to aid in supporting
"the city government. That no revenue for
"State or municipal purposes can be derived
"from the *agencies* or *instrumentalities* of commerce,
"no one will contend. * * * * *In ap-*
"*proaching the question thus presented, it is proper*
"*to note that the license tax in question is purely a*
"*tax on the privilege of doing the business in which*
"*the telegraph company was engaged.* * * * *

"The question is squarely presented to us,
"therefore, whether a State, as a condition of
"doing business within its jurisdiction, may
"exact a license tax from a telegraph company,
"a large part of whose business is the transmis-
"sion of messages from one State to another.

"*Can a State prohibit such a company from doing*
"*such a business within its jurisdiction unless it will*
"*pay a tax or procure a license for the privilege?*"

"If it can, it can exclude such companies and "prohibit the transaction of such business alto- "gether. We are not prepared to say that this "can be done. Ordinary occupations are taxed "in various ways, and in most cases legitimately "taxed, *but we fail to see how a State can tax a "business occupation when it cannot tax the business "itself. Of course, the exaction of a license tax as a "condition of doing any particular business is a tax "on the occupation, and a tax on the occupation of "doing business is surely a tax on the business.* * "(page 1384.) State laws are unconditional "which impose a tax on messages sent in the "service of the Government, or sent by any per- "sons from one State to another.

"In the present case, it is true, the tax is not "laid upon individual messages, *but is laid on the "occupation, or the business of sending such messages.* "It comes plainly within the principle of the "decisions lately made by this Court in *Robbins* "vs. *Shelby Taxing District*, 120 U. S., 489, etc.

"It is parallel with the case of *Brown* vs. *Ma- "ryland*, 12 Wheat., 419. *That was a tax on the "occupation, and this Court held that it was equiva- "lent to a tax on the business carried on (the import- "ation of goods from foreign countries), and even "equivalent to a tax on the imports themselves*," etc.

The Court goes on and says, at page 648: "In "our opinion, such a construction of the Consti- "tution leads to the conclusion that no State "has the right to lay a tax on interstate com- "merce in any form, whether by way of duties "laid on the transportation of the subjects of "that commerce, or on the receipts derived from "that transportation, *or on the occupation or business "of carrying it on;* and the reason is that such "taxation is a burden on that commerce, and "amounts to a regulation of it, which belongs "solely to Congress." To the same effect, and affirming the Leloupe case, is—

Asher vs. *Texas*, 128 U. S., 129.

Counsel for the defendant in error seems to have overlooked the distinction which has been laid down by this Court. We do not deny that the States have power to require conditions to be performed by certain corporations before they can transact business therein, but such conditions or licenses can only be required from those corporations which are not engaged in interstate commerce.

This was decided in numerous cases, notably in *Paul* vs. *Virginia*, 75 U. S., 168, where the Court decided that a State statute which enacts that no insurance company not incorporated under the laws of the State passing the statute

shall carry on its business in the State without previously obtaining a license for that purpose, is not in conflict with the clause of the Constitution of the United States, which declares that Congress shall have power to regulate commerce, etc., because the issuing of a policy of insurance is not a transaction of commerce, even though the parties be domiciled in different states, and is only a simple contract of indemnity against loss.

To the same effect is the case of *List* vs *Commonwealth*, 1 Interstate Commerce Reports, 784.

This distinction was very clearly laid down in the case of the *Pembenia Consolidated Silver Mining Co.* vs. *Pennsylvania*, 125 U. S., 181.

The Court in that case decided that the exactment of a license fee by a State, to enable a corporation organized under the laws of another State to have an office within its limits for the use of the officers, stockholders, agents or employees of the corporation, does not infringe upon the commercial clause of the Federal Constitution, *provided the corporation is neither engaged in carrying on foreign or interstate commerce* nor employed by the Government of the United States. Justice Field, on page 186, says: "As to these corporations (not carrying on foreign or " interstate commerce) the doctrine of *Paul* vs.

"*Virginia* applies. The Colorado corporation "(the plaintiff in error) does not come within any "of the exceptions." The words in parenthesis are my own. Again, at page 190, the Justice says: "*The only limitation upon this power of the* "*State to exclude a foreign corporation from doing* "*business within its limits or hiring offices for that* "*purpose, or to exact conditions for allowing the* "*corporation to do business or hire offices there, arises* "*where the corporation is in the employ of the Federal* "*Government or where its business is strictly com-* "*merce, interstate or foreign.*"

The Court found that the corporation in that case *was not engaged in commerce*, and therefore came within the rule that the State could exact conditions to be performed by the corporation before allowing it to do business in the State of Pennsylvania, because it was a legitimate exercise of the police power of the State and consequently upheld the ordinance.

The case of *Norfolk* vs. *Western R. R.*, 26 Am. and Eng. R. R. cases, 48 and 5. Central Rep., 240, cited by the counsel of defendant in error, decided by the Pennsylvania State courts, and which was solely relied upon by the California court in deciding the case at bar, has no application to the case at bar, as an examination of the facts will disclose. The defendant railroad *was*

by its charter restricted territorily. The Court found that it was not engaged in interstate commerce. The road was a local one, and to establish the fact that it was engaged in interstate commerce it proved that it had become, by reason of its agreements and compacts with other railroads, a link in a through line of road. And the Court decided that as "*This company has not corporate "franchise to carry any freight or passengers, from or "to any point in Pennsylvania, hence as to Pennsyl- "vania, its transportation authorized by its charter can- "notbe regarded as interstate transportation in any "point of view.* * * * We understand that its "protection (the commercial clause of the U. S. "Court) is extended only to such transportation "as is completely and lawfully authorized to be "conducted from one State to another."

The sole question in that case was whether the defendant was engaged in interstate commerce, and the Court decided that it was not; whereas, in the case at bar, the N. Y., Lake Erie and Western R. R. is admittedly a corporation engaged in interstate commerce, consequently there is no analogy between the two cases, other than that, at page 242 of the Central Reporter, the Court said: "For the purposes of this case we "assume that the license fee before us would be "a regulation of commerce if sought to be im-

" posed upon a *corporation lawfully* engaged in the " business of *interstate transportation.*" And the Court found that as a matter of fact the Norfolk and Western R. R. was not engaged in lawful interstate transportation, *because of the restrictions in its charter.*

We respectfully call the Court's especial attention to the case of *Osborne* vs. *Mobile*, 16 Wall., 479. The facts of that case are almost parallel with the one at bar. In that case the license tax " was upon a business carried on in the city " of Mobile. The business licensed included " transportation beyond the limits of the State, " OR RATHER THE MAKING OF CONTRACTS WITHIN THE " STATE FOR SUCH TRANSPORTATION BEYOND IT.

" It was with reference to this feature of the " business that the tax was in part imposed; but " it would no more be a tax upon interstate com- " merce than a general tax on drayage would " be," etc., etc. The facts thus narrated are almost identical with the facts in the case at bar, and that decision would unquestionably be in point. But this Court in the very recent case of *Leloup* vs. *Mobile*, 127 U. S., 674, and which has already been cited, sets that doctrine aside and expressly overrules the decision of *Osborne* vs. *Mobile*. Justice Bradley in the Leloup case at page 647, says : " The State Court relies upon

"the case of *Osborne* vs. *Mobile*, 16 Wall. 479, "which brought up for consideration an ordi- "nance of the city requiring every express "company or railroad company doing business "in that city and having business extending be- "yond the limits of the State, to pay an annual "license of five hundred dollars, etc. * * * * *

"This Court held that the ordinance was not "unconstitutional. This was in December term, "1872. In *view* of the course of decisions which "have been made since that time, IT IS VERY CER- "TAIN THAT SUCH AN ORDINANCE WOULD NOW BE RE- "GARDED AS REPUGNANT TO THE POWER CONFERRED "UPON CONGRESS TO REGULATE COMMERCE AMONG THE "SEVERAL STATES."

In conclusion we respectfully submit that the judgment of the Superior Court should be reversed and the plaintiff in error discharged.

Respectfully submitted,

JOSEPH P. KELLY,

Attorney for Plaintiff in Error.

Office Supreme Court U. S.
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JAMES H. McKENNEY.
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No. 1190.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

J. G. McCALL,

Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

JAS. D. PAGE,

Attorney for Defendant in Error.

Filed October ..... 1889.

..... Clerk.

By ..... Deputy Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

J. G. McCALL,
PLAINTIFF IN ERROR,
v.
THE PEOPLE OF THE STATE OF CALIFORNIA,
DEFENDANT IN ERROR.
No. 1190.

In this case the plaintiff in error is charged as a railroad agent with carrying on his business in the city and county of San Francisco, State of California, without first procuring a license, as provided by an ordinance of the Board of Supervisors.

The business is that of soliciting in the interest of the New York, Lake Erie and Western Railroad, admittedly a foreign corporation, operating and doing business between Chicago, Illinois, and New York City, New York, wholly outside of California.

Counsel for the plaintiff in error contends that the imposition of a license tax under the circumstances is in violation of the Constitution of the United States and the laws of Congress as interfering with commerce and interstate commerce.

I respectfully submit that the facts of this case do not bring it within the terms of the cases relied on by counsel for plaintiff in error in his brief.

It is not the business of the corporation represented by plaintiff in error that is sought to be taxed, but it is claimed that because the plaintiff maintains an agency in said city, that for that privilege the license imposed should be paid.

The case of Robbins *v.* Taxing District of Tennessee (7 *Sup. Ct. Reporter*, 592) can hardly be classed on an equal footing with the case at bar.

In that case the defendant had for an object the introduction into the community where the case arose of goods from his employer at Cincinnati; goods which when introduced would become subject to taxation in the hands of the person engaged in handling them, while in the case at bar no commodity is sought to be introduced into California, nor is there any interchange of commodities sought to be established, nor is there any interstate commerce as between California and any other place.

The business solicited is carried on entirely outside of California.

The solicitation of business under the circumstances cannot be interstate commerce, as it relates to something wholly outside of the State in which solicitation is made, and has not for an end the introduction of anything into the State.

The case of Le Loup *v.* Port of Mobile (8 Sup. Ct. Rep., 1380) is in exactly the same position.

There the telegraph company was regulated by act of Congress and was engaged in traffic in the State of Alabama, and between that State and other States, and peculiarly, therefore, within the laws relating to commercial relations between the States, or interstate commerce.

But in the case at bar, the New York, Lake Erie & Western R.R. is entirely foreign to California, and what its agents ask is patronage of the passenger after he reaches Chicago, a distance of nearly 2,000 miles after passing the California boundary.

The municipal license tax sought to be recovered by this action is not a tax upon the business of the railroad represented, but a license tax for the privilege of maintaining an agency in the city of San Francisco.

The case at bar, I submit, is not within the rule cited by counsel for plaintiff in error, but comes more particularly within the rule laid down in the case of the Norfolk & Western R.R. Co. *v.* The Commonwealth (26 Am. & Eng. R.R. cases, 48), which I contend is on all fours with the case at bar. Prosecution was had under a statute of the State of Pennsylvania requiring foreign corporations exercising the privilege of having an office in Pennsylvania to pay a license fee therefor.

The Norfolk & Western Railroad extends from Norfolk, Virginia, to Bristol, Tennessee, and is wholly outside the limits of Pennsylvania, although the company maintained an office in that State. The Court, on the hearing of the case, held: "The transportation which this railroad "company may lawfully conduct by virtue of its own "corporate franchises is not interstate transportation at "all, but is confined to territorial limits which are entirely "without the State of Pennsylvania. In other words, this "company has no corporate franchise to carry any freight "or passengers from or to any point in Pennsylvania; its "transportation authorized by its charter cannot be re-"garded as interstate transportation in any point of view. "The through transportation in which it does participate "within its own territorial limits is carried on by force of "certain contracts into which it has entered with other

S., 640) will disclose how especially the exception applies to that case.

In the drummers' cases the connection of the avocation with interstate commerce is immediate. Goods are to be sent to the State where the drummer is working from another State. He secures orders for them to be sent, *i. e.*, arranges the contract for sending them. The sending is commerce—interstate commerce—and the contract to send is immediately connected with this commerce and essential to its existence; for one of the two States to prevent the contract would be to prevent the commerce.

But the railroad here in question is operated wholly between two States distant from California. The commerce which it does is exclusively between those distant States—namely, transporting persons and goods between them.

A man in California soliciting business for such a road is at best very remotely connected with interstate commerce, and to hinder his work cannot directly hinder the interstate commerce of the road. That commerce is elsewhere, and his business is not essential to its existence, but only very remotely, if at all, accessory to its prosperity. The constitutional provision was intended to remedy an unfortunate condition of things, in which States to or through which commerce passed or would pass subjected that commerce to burdens and hindrances. The sweeping away of these burdens and hindrances was the object to be effected, and the Constitution should not be construed to further restrict the rights of the States than is necessary to get rid of substantial hindrances to commerce. Matters which, in a very remote degree, and in a State in which the commerce itself does not go, affect not the freedom of the commerce but its volume, should be regarded as still within the control of each State. California can levy no prohibitive tax in this case, for the

commerce is wholly without California and beyond her reach. Neither can she "regulate" it, for the same reason. Neither can she interfere with any of the usual means and instruments of carrying on such a commerce as a railroad carries on, still for the same reason. A person distant from the road, soliciting others to travel over it when they get to it, is not one of the usual—certainly not one of the necessary—instruments of a railroad company's commerce. The essential commerce is the carrying; whereas this defendant does none of the carrying nor even of the contracting to carry—he is a mere advertisement.

It is not claimed that the ordinance providing for a license from railway agencies conflicts with the laws of the State of California, nor that it is an unwarrantable exercise of police power on the part of the board of supervisors, except in so far as it is claimed that it conflicts with the Constitution of the United States and the laws of Congress.

I respectfully submit that the right sought to be enforced is a proper one, and that under the cases cited there is no interference with commerce nor interstate commerce in so doing.

I respectfully submit that the judgment of the court below should be affirmed.

J. D. PAGE,
Atty. for Deft. in Error.